

Zhou (Migration) [2018] AATA 4888 (12 October 2018)

- 1.
- 2.
- 3.

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Rui Zhou
Ms Jing Shi
Master Louie Yi Jun Zhou

CASE NUMBER: 1721205

DIBP REFERENCE(S): BCC2017/1370214

MEMBER: Katie Malyon

DATE: 12 October 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Skilled Independent (Permanent) visas.

Statement made on 12 October 2018 at 12:36 pm

CATCHWORDS

MIGRATION – Skilled Independent (Permanent) visa – Subclass 189 Skilled Independent – bogus documents – IELTS test report – validity of test results – altered test results – compelling circumstances – waiver provisions – working in Australia – son born in Australia – postgraduate studies – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65

Migration Regulations 1994 (Cth), Schedule 2 cl 189.215, Schedule 4 PIC4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 22 August 2017 to refuse to grant the applicants Skilled Independent (Permanent) visas under s.65 of the *Migration Act 1958* (**the Act**).
5. The applicants applied for the visas on 13 April 2017. The delegate refused to grant the visas on the basis that the first named applicant, Mr Rui Zhou, did not satisfy the requirements of cl.189.215 of Schedule 2 to the *Migration Regulations 1994* (**the Regulations**) because he has provided a bogus document to the Department and, accordingly, does not satisfy Public Interest Criterion (**PIC**) 4020.
6. *Background*
7. As noted in the delegate's decision, a copy of which was provided to the Tribunal by Mr Zhou, he submitted an IELTS English language test result undertaken 11 February 2017 to the Department after lodgement of his application. The Department undertook a routine check of the validity of the test results and identified a discrepancy in the marks awarded for Writing. In the IELTS test lodged with the Department, Mr Zhou scored 7.0 for Writing; however, the IELTS test report verification service indicated that he scored only 6.0 for Writing. As Mr Zhou's scores for Listening 7.5, Reading 7.5 and Speaking 7.5 were unchanged, the delegate requested verification of the results from IELTS. The results confirmed Mr Zhou scored Listening 7.5, Reading 7.5 and Speaking 7.5 but only 6.0 for Writing.
8. When IELTS confirmed the results as indicated in its test report verification service, the delegate wrote to Mr Zhou inviting his comments on the adverse information received. Mr Zhou's newly appointed representative responded addressing the waiver provisions in PIC 4020(4). He referred to the fact that Mr Zhou has 7 years' experience in software application developer in Australia and is engaged in full-time employment as a Program Developer.
9. Mr Zhou appeared before the Tribunal on 3 October 2018 to give evidence and present arguments. The applicants were represented in relation to the review by their registered migration agent who also attended the hearing.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (**PIC 4020**) as required by cl.189.215 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
12. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the **Attachment** to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

13. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act. The provisions of s.5(1) of the Act are extracted in the Attachment to this decision. In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
14. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. *Documentation lodged prior to the hearing*
17. Prior to the hearing, Mr Zhou's representative provided a submission pursuant to s.358 of the Act. He notes that the Department's file does not contain a copy of the *Test Report Verification Service Report* published by IELTS and, as such, the Tribunal cannot discount the possibility that the delegate and email communications from IELTS are mistaken in quoting Mr Zhou's score. As such, his client has been denied natural justice because he is not at had access to the reference materials on which the decision to refuse his visa was based.
18. *Hearing*

19. At the commencement of the hearing, the Tribunal provided a copy of the IELTS *Test Report Verification Service Report* (the Report) which it had obtained and give the Report to Mr Zhou. The Report confirms Mr Zhou scored 6.0 for Writing when he undertook the test on 11 February 2017. The Tribunal acknowledged the absence of a copy of the Report in the Department's file. Mr Zhou's representative conceded that, in the circumstances, the basis of his contention in his pre-hearing submission is no longer relevant.
20. Consistent with the provisions of s.359AA of the Act, the Tribunal put to Mr Zhou evidence that, having regard to the Report, the IELTS test result dated 11 February 2017 which he provided to the Department following lodgement of his Subclass 189 visa application has been altered by a person who does not have authority to do so: that is, it is a bogus document within the meaning of that term in s.5(1)(b) of the Act. Mr Zhou chose to respond at the hearing. He apologised sincerely for altering his test score for Writing from 6.0 to 7.0. Mr Zhou explained that because he had just turned 40 years of age, he needed additional points and, in a moment of stupidity, altered the score on his IELTS test result. He added that his main purpose in attending the Tribunal's hearing was so that he could articulate his feeling of guilt and regret. He also said that he takes full responsibility and accepts the consequences arising from the Tribunal's decision to affirm the delegate's refusal of his Subclass 189 visa application.
21. Based on the Mr Zhou's admission and having regard not only to documentation in the Department's file but also the Report, the Tribunal is satisfied that there is evidence that Mr Hsu has given to the Department a bogus document. Therefore, he does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) be waived?

22. The requirements of PIC 4020(1) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03 of the Regulations), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
23. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
24. The Tribunal acknowledged at the hearing submissions by his representative made to the Department on 15 August 2017 in relation to Mr Zhou's employment with Ticketek Pty Limited (Ticketek). It also acknowledged that he had undertaken a Master of Information Systems at the Central Queensland University completed in July 2015 and that his son had been born in Australia in January 2015.
25. Ask for evidence as to why the Tribunal should consider waiving the requirements of PIC 4020(1) in his case, Mr Zhou told the Tribunal that he has no evidence to provide from his Australian employer, or any other person or persons. He added that he continues to work with Ticketek as a Developer Programmer. Mr Zhou acknowledged that with the benefit of advice from his representative he is aware his working in Australia as well as his post-graduate study in Australia and the fact that his son has been born in Australia is not sufficient to justify a waiver of the requirements of PIC 4020(1).

26. Based on evidence provided, the Tribunal is not satisfied there are compelling circumstances that affect the interests of Australia that justify granting a Subclass 189 visa to Mr Zhou. Further, the Tribunal is also not satisfied that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify granting of the visa. Therefore, the requirements of PIC 4020(1) should not be waived.
27. On the basis of the above, Mr Zhou does not satisfy PIC 4020(1) for the purposes of cl.189.215 of Schedule 2 to the Regulations.
28. The second named applicant, Mr Zhou's wife, and the third named applicant, his son, applied for a Subclass 189 visa on the basis of being a member of the family unit of a person who holds such a visa. There is no evidence before the Tribunal that they meet primary requirements for grant of the visa.

DECISION

29. The Tribunal affirms the decision not to grant the applicants Skilled Independent (Permanent) visas.

Katie Malyon
Member

ATTACHMENT

30.

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

- (a) compelling circumstances that affect the interests of Australia; or
- (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

- (5) In this clause:
information that is ***false or misleading in a material particular*** means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

oOOo